

Supreme Court, U. S.

FILED

OCT 27 1977

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

NO. **77-797**

HERBERT O. LA MORDER,

Petitioner,

v

SHERILL E. LA MORDER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MACKENZIE, CASTAGNA, BENNISON
& GARDNER

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P.O. Drawer 2137

Clearwater, Florida 33517

Attorneys for Respondent

OPINIONS BELOW

The opinion and Order of the United States District Court for the Middle District of Florida and the Order of the United States Court of Appeals for the Fifth Circuit are appended to the Petition. The Order of the United States Court of Appeals dated June 30, 1977 denying a Motion for Rehearing is not attached to the Petition.

JURISDICTION

Petitioner has not alleged any basis of jurisdiction in this Court. Respondent has raised in the District Court the jurisdictional objection that Petitioner failed to even utilize, let alone exhaust, available State Court remedies in failing to file a Motion for Rehearing or even appeal

the April 9, 1973 Order and has failed to file Petition for Habeas Corpus in State Court or to even attempt to file a petition for custodial change in State Court.

QUESTIONS PRESENTED

Petitioner's questions are clearly unrelated to any issue raised by the Order of the United States Court of Appeals to which this Petition is directed. The questions presented are simply:

1. Did the Circuit Court of Appeals err in dismissing an appeal from an interlocutory order of a District Court.
2. Did the Circuit Court

of Appeals err in dismissing an appeal from a District Court suit in which no "case or controversy" exists.

ARGUMENT

Petitioner alleges in Paragraph 2 of the Petition that:

"Petitioner seeks review of a decision of the United States Court of Appeals for the Fifth Circuit."

and in Paragraph 7A that:

"This appeal is based upon the entry of an Order by the United States Court of Appeals for the Fifth Circuit entered on June 30, 1977 wherein the Fifth

Circuit granted Respondent's Motion to Dismiss on the grounds that the Fifth Circuit did not have jurisdiction to entertain the appeal".

It affirmatively appears from the Order of the District Court attached to the Petition that said Order is not a final order from which a plenary appeal could be taken, but is merely an interlocutory order and the Court of Appeals had no jurisdiction to entertain the appeal. USCA 28 sec 1291, 1292;

It also affirmatively appears from the District Court Order that because the Respondent stipulated to all of the relief to which Petitioner was entitled, there was no longer any "case

or controversy" in that Court.

The Petitioner may, tomorrow, file in the State Court a petition to obtain custody of the child and upon a showing that it will be to the child's best interest so to do, the Petitioner must prevail. No substantial federal question is present here nor can one be contrived to exist simply because of Petitioner's insistence that his presumed "rights" transcend the courts polestar concern with the best welfare of the child.

As to the questions presented in the Petition filed herein, an affirmative answer in no way requires the intervention of this Court any more than it would "require" the District Court to grant the relief requested. Simply

because a court has the "power" or "jurisdiction" to act does not "require" that they so act. The function of parens patriae is a State function as opposed to a Federal function and so long as the District Court preserved and protected the child's best interest in permitting the State Court to make the determination of the proper custodial parent, there was no need for it to invade the province of the State.

Petitioner seriously persists in seeking the assistance of our judicial system to enforce his demands that we blindly tear this child from her mother's arms and fling her to father because four and a half years ago a Circuit Judge may have made a procedural mistake.

CONCLUSION

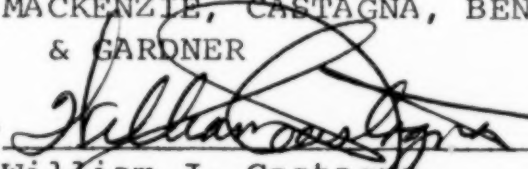
It is respectfully urged that Petitioner has wholly failed to sustain his burden under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of Federal law which has not been, but should be, settled by this Court, nor has the Court of Appeals decided a Federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals decision was a proper one. The

Petition for Writ of Certiorari should be denied.

Respectfully submitted,

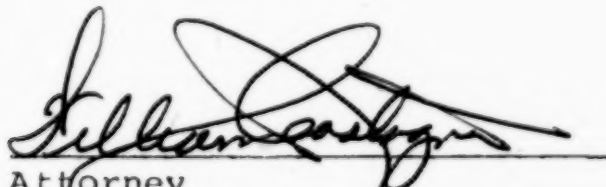
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By


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY forty copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari has been furnished to the Supreme Court of the United States and three copies of said Brief have been furnished to Mr. Richard M. Robbins, Attorney for Petitioner, 501 South Fort Harrison Avenue, Clearwater, Florida 33516, by U. S. Mail this 23rd day of November, 1977.


Attorney